

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 750 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.
  2. To be referred to the Reporter or not? Yes, except [ ] poriton.
  3. Whether Their Lordships wish to see the fair copy of the judgement? No.
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.
  5. Whether it is to be circulated to the Civil Judge? No.
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MUTVA DADU ABDREMAN

Versus

STATE OF GUJ

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Appearance:

MR JIVANLAL G SHAH for appellants.

MR SP DAVE, A.P.P. for Respondent No. 1

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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 08/05/98

ORAL JUDGEMENT

The present appellants, six in number, who have been described as the accused persons, came to be charged with the offence punishable u/s 395 of the Indian Penal Code (IPC for short) in Sessions Case No.43 of 1987.

After the trial and hearing, the learned Sessions Judge by his impugned judgment dated 19th July, 1988 convicted the accused persons and sentenced them to undergo rigorous imprisonment for a period of three years and to pay fine of Rs.500/- i/d to undergo further sentence for a period of three months for the aforesaid offence charged against them. They have preferred this appeal bringing under challenge their conviction and sentence.

2. Before the allegations made by the complainant, as per the prosecution case, are set out, following brief facts emerging from the prosecution evidence might first be visualized:

There is a village, Jhara by name situated in Nakhatrana Taluka, District Kutch. The persons of the complainant party appear to be the inhabitants of the said village. There is a village, Kulay by name also situated in Nakhatrana Taluka, District Kutch and the accused persons appear to be the inhabitants of the said village. There is some forest area where the alleged incident occurred. It is around 2 to 3 k.m. from village Jhara and around 3 k.m. from village Kulay. There is one more village namely Vedhar which is at a distance of around 4 k.m. from the aforesaid forest area where the alleged incident occurred. One Raising was the inhabitant of the said villalge at the relevant point of time. Finally, Nakhatrana Police Station where the complaint is stated to have been given is at a distance of about 20 to 25 k.m.

There were 80 camels at the scene of offence. The camels might be 'he' or 'she' camel. In dictionary that might not make difference but in the present case they were 'she' camels and that would make difference with regard to their added utility of giving milk product. It appears that the persons of the complainant party were deprived of the camels for a few days and that is how it appears that they have suffered loss.

The camels were found in the sim of village Gichada and the complainant Magansinh was present when the police in the company of accused Dadu and pancha witness Abhesing went there. Thus, it appears that the camels could be traced out in a public place and it does not appear in the prosecution evidence that any of the accused persons had any idea of having unlawful gain in any manner from the aforesaid camels.

Finally, the persons of the complainant party and the accused persons were known to each other on account

of the fact that the accused persons were going to the persons of the complainant party for fetching milk of camels.

3. In the back ground of the aforesaid facts, now the prosecution story might be noted.

Complainant Magansinh Bhimji p.w. 2 exh. 14 aged about 60 years inhabitant of village Jhara, Bhuj, complained before the police on 14th October, 1986 at about 3.30 p.m. that he in the company of his younger brother Laduji Bhimji and Satidan Chensing had gone for the purpose of grazing of their camels. There were 80 camels in all, 76 belonging to the complainant and 4 belonging to Satising. They had taken rest in the afternoon and also had water being taken from the village pond in the sim of village Motichur. After sunset they proceeded towards a place in the nearby forest area situated at a distance of around 2 k.m. to the east of village Kulay. At that place, they left the camels for grazing and sat for taking their evening meals. By that time, Jetmalji Jivanji of village Guneri arrived at that place and told the complainant that two of his camels were missing. He further asked the complainant if they were in the complainant's camels grazing at that place and the complainant replied that they were not there. Thereafter, Jetmalji had also accompanied the persons of the complainant party for taking evening meals. It was around 10-00 O'clock at night when 14 to 15 persons suddenly reached the place where the persons of the complainant party were taking their meals. It was dark night. They asked the persons of the complainant why they had stationed at the place. Asking so, younger persons had tied the persons of the complainant party with the ropes. However, Jetmalji was not so tied. They also gave fist beating and kick beating to the persons of the complainant party. They were armed with the sticks. Out of them six accused persons could be recognized. The complainant could not recognize the other persons. Thereafter, they had taken 80 camels with them. Sometimes thereafter Jetmalji had released the persons of the complainant party who had first gone to Vedhar from where Jetmalji parted. The complainant informed one Sodha Raising Jalimsing of village Vedhar about what happened. The complainant has alleged that the accused persons and other persons had taken away one old blanket valued Rs. 50/- and one towel of complaint's brother Laduji, valued Rs.25/-, along with 80 camels valued Rs. 60,000/-.

[4. The matter has been argued out by the learned

advocate appearing for the appellants and learned A.P.P. for the State keeping in mind the aforesaid facts which surfaced from the prosecution evidence as also the allegations made by the complainant as appearing in the complaint briefly stated hereinabove.]

5. It has been submitted that there was enmity between the persons of the complainant party and the accused persons on the question of taking of water from the village pond in village Kulay. Hence the accused persons were falsely implicated by the complainant. It has been alternatively submitted that the complainant has exaggerated the facts as can be seen from the prosecution case. No blanket or towel could be traced out from any place much less from the accused persons as against the find of the camels from the public place as stated above. Before the police could go there in the company of the concerned accused person as also the pancha witness the complainant had been present with the camels at the said public place. The prosecution has not been able to show from any material worth the name that any of the accused persons had got any gain or benefit out of the camels in question. Hence it has been submitted that the accused persons could not be convicted for the offence punishable u/s 395 of the IPC (dacoity). At best, the offence of mischief could be said to have been committed u/s 426 or 427 of the IPC as the accused persons expressed their objection to grazing of the camels in a public forest area by the persons of the complainant party and in the process the accused persons are stated to have driven away the camels depriving the persons of the complainant party utility of the camels for a few days. There is some substance in the last mentioned submission made on behalf of the accused persons. The facts which have been disclosed from the prosecution evidence and noted at the outset would clearly indicate that the incident is established to have occurred but not in the manner in which it has been sought to be suggested in the prosecution story and the offence u/s 395 of the IPC could hardly have been attributed to the accused persons.

6. It has to be noted that rope/s and the handkerchief with which the persons of the complainant party were alleged to have been tied at the time of the incident in question were recovered from the accused persons and not from the place of the incident or from any place of the persons of the complainant party. This is apparently strange. Ordinarily, they could have been recovered from the place of the incident or from the persons of the complainant party if what the complainant alleged was true. However, find of the handkerchief or

rope/s from the accused person/s clearly negatives the prosecution story about the accused persons or any of them, having resorted to the persons of the complainant party being tied with the handkerchief and rope/s at the time of the incident. Therefore, that part of the prosecution story clearly appears to have been exaggerated and in any event cannot be said to have been established beyond reasonable doubt.

7. The prosecution has examined Dr. Subhashchandra Saranaiya Hiremath, Medical Officer, Nakhatrana Primary Health Centre at exh. 10. He has deposed to the facts with regard to the complainant Rathod Magansinh Bhimji having been examined by him at about 4-30 in the afternoon on 14th October, 1986 and the complainant complained about the pain in right thigh. The witness, however, did not find any external marks of injury and he in terms deposed that no opinion could be given about the complaint of pain made by the complainant Rathod Magansinh Bhimji. On 15th October, 1986 he examined the witness Satidan Chensing also complaining of pain in his thigh. The medical finding was the same. On 18th October, 1986 he examined Laduji Bhimji complaining of pain in his chest. The medical finding was also the same. Medical certificates of the three persons of the complainant party were received in evidence at exh. 11, 12 and 13. The witness could not say whether any of the alleged injuries could be caused by fist and/or kick beating. The witness in his cross-examination admitted that if the person was tied with rope/s there would be marks of rope/s on the concerned part of the body and none of the aforesaid patients had any such marks on any part of his person. Late filing of the complaint and late examination of the witnesses by the Medical Officer would also assume importance in the light of the facts noted above. However, the fact remains that there were no marks of rope/s and that would throw doubt about the complainant party having been tied with the ropes or with any such material. Now, if the accused persons in the company of 8 to 9 persons had been face to face with the persons of the complainant party at about 10-00 O'clock at night and had an occasion to ask the persons of the complainant party as to why they were at such a point of time when it was dark night having their camels grazing in the forest area it would indicate that the accused persons could not have any intention of committing robbery or dacoity. Besides, as stated above, there is no material in the prosecution evidence to indicate any unlawful gain taken from the camels in question by any of the accused persons. All these circumstances, in the

back ground of the facts noted above would clearly indicate that the prosecution has failed to establish the required dishonest intention for the offence punishable u/s 395 of the IPC against the accused persons.

8. Section 395 of the IPC provides for punishment for committing offence of dacoity. The offence of dacoity is committed when there are five or more persons who indulge in commission of the offence of robbery (See Sec. 391 of the IPC). Section 390 of the IPC defines robbery which reads as under :-

"390 . Robbery - In all robbery there is either theft or extortion.

When theft is robbery - Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery :- Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation. - The offender is said to be present if he is sufficiently near put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint."

9. It might be seen from the aforesaid definition of the offence of robbery that it involves either theft or extortion. Extortion is defined u/s 383 of the IPC, which reads as under :

"383.- Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed

or sealed which may be converted into a valuable security, commits "extortion".

Section 378 of the IPC deals with 'theft' and reads as under :

"378.- Whoever, intending to take dishonestly any moveable property out of the possession of any person without the person's consent, moves that property in order to such taking, is said to commit theft."

10. It might be noted from the aforesaid definitions of theft and extortion that element of dishonesty is a necessary ingredient of both the offences although the element of dishonesty is present in different forms in both the offences.

The word "dishonestly" has been defined in Section 24 of the IPC. Accordingly, whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing "dishonestly".

Thus, wrongful gain to one or wrongful loss to another with required intention are the criteria for dishonest frame of mind. As has been observed in Krishna Kumar V. Union of India 1959 S.C. 1390, wrongful gain includes wrongful retention and wrongful loss includes being kept out of the property as well as being wrongfully deprived of property, and wrongful gain or wrongful loss needs be associated with malicious or dishonest intention.

11. Section 425 of the IPC reads as under :-

"Whoever with intent to cause or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief"

Explanation 1. - It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2. - Mischief may be committed by an act affecting property belonging to the person who commits the acts or to that person and others jointly."

12. It might be noted from the aforesaid definition that dishonest frame of mind is absent in the aforesaid definition of "mischief". Either intention to cause wrongful loss or knowledge that such loss is likely to be caused which is an essential ingredient of the offence of "mischief". To constitute the offence of mischief it would be sufficient if the person who caused the injury or damage knew that he was likely by his act to cause injury or damage to any person.

13. In the present case, the facts noted above would apparently indicate commission of offence of mischief as defined in Section 425 of the IPC. Therefore, at best the accused persons could be held responsible for the offence punishable u/s 427 of the IPC which deals with the "mischief" causing damage to the extent of fifty rupees or upwards, and the punishment in that respect is imprisonment upto 2 years, or fine, or both.

14. In my opinion, having regard to the facts of the present case, the prosecution has at the best been able to establish the offence of mischief as aforesaid against the accused persons. This conclusion would be fortified from the unassailable fact that 80 camels of the persons of the complainant party were not with the complainant for a few days when the persons of the complainant party were deprived of the same and the utility thereof. To that extent the prosecution evidence deserves to be accepted. Examining the matter from the aforesaid point of view, conviction rendered by the learned Sessions Judge u/s 395 of the IPC against the accused persons cannot be upheld. The same deserves to be altered to conviction u/s 427 of the IPC.

[15. In the result, the conviction and sentence rendered against the accused persons by the learned Sessions Judge as per his impugned judgment is hereby quashed and set aside and the accused persons are instead convicted of the offence punishable u/s 427 of the IPC.

16. I have heard the learned advocate appearing for the appellants and learned A.P.P. for the State on the question of sentence. It is not in dispute that the accused persons for a couple of days were in jail at the

initial point of time. It is also not in dispute that they have paid up the fine. The nature of offence is such as would not call for any deterrent sentence at this stage. Besides, nearly 12 years have passed since the incident occurred. Bearing in mind the nature of the offence and all the aforesaid facts, the accused persons are sentenced to one undergone and to the fine which they have already paid up.

17. In the result, their bail bonds will stand cancelled. The appeal is accordingly partly allowed.]

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To constitute the offence of mischief it would be sufficient if the person who caused injury knowing that he was likely to cause such injury or damage to the other person.